



## Children, Families, Health, and Human Services Interim Committee

PO BOX 201706  
Helena, MT 59620-1706  
(406) 444-3064  
FAX (406) 444-3036

### 62nd Montana Legislature

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FONG HOM, Secretary

October 26, 2011

Ms. Anna Whiting Sorrell, Director  
Department of Public Health and Human Services  
111 North Sanders, Room 301  
Helena, MT 59620

Dear Director Whiting Sorrell,

Unfortunately, the Children, Families, Health, and Human Services (CFHHS) Interim Committee is, for the second time in two years, in the position where in order to effectuate the legislative intent of 53-6-125, MCA, it must object to the Department of Public Health and Human Services' (DPHHS) rulemaking with respect to the resource-based relative value scale (RBRVS) for physician reimbursement of services under Medicaid. Stabilizing physician reimbursement rates at 2010 levels in the current biennium with modest changes over the next few years will create a predictable operating environment for medical providers. Most importantly, it appears that by using all of the adjustments available to the DPHHS, it is possible to meet the legislative intent of 53-6-126, MCA, and stay within the DPHHS's appropriation.

The CFHHS Interim Committee recognizes that accomplishing this goal may be time-consuming. However, ensuring that the reimbursement rates do not fall below fiscal year 2010 levels is necessary to meet legislative intent. For these reasons, the CFHHS Interim Committee has no alternative but to object to MAR Notice 37-541 relating to the RBRVS for physician reimbursement of services under Medicaid.

Pursuant to the CFHHS Interim Committee's statutory authority as the appropriate administrative rule review committee under 5-5-225, MCA, and the provisions of Title 2, chapter 4, parts 3 and 4, this letter constitutes notice to the DPHHS that the members of the CFHHS Interim Committee have voted unanimously to object to the adoption of rulemaking promulgated by MAR Notice 37-541 relating to the RBRVS for physician reimbursement of services under Medicaid. Montana Medicaid uses the RBRVS rate system to calculate the fee paid to different types of health care professionals. The DPHHS annually proposes to amend ARM 37.85.212 to adopt current relative value units (RVUs). RVUs are set by the Centers for Medicare and Medicaid Services. The fee paid to a Medicaid provider for a service is calculated by multiplying the particular service's RVU by the conversion factor. The conversion factor is set by the DPHHS. The parameters of the conversion factor for licensed physicians is governed by 53-6-125, MCA which states in pertinent part:

#### DOCUMENT PURPOSE:

- Agenda Item: Agency Oversight
  - ◊ Committee Review/Discussion/Action
    - Staff will review status

(2) (a) For state fiscal years 2011 through 2013, the conversion factor is \$40.09. The conversion factor may be adjusted by the department in order to maintain reimbursement, at a minimum, at the fiscal year 2010 reimbursement rate.

Section 53-6-125(2)(a), MCA, was amended by Senate Bill No. 241 (SB 241), which received significant bipartisan support, during the 2011 legislative session. The conversion factor set by the DPHHS for fiscal year 2012 from MAR Notice 37-541 is \$33.23. The conversion factor for fiscal year 2010 was \$38.43. Even though the conversion factor for physician services for fiscal year 2012 is less than the conversion factor for fiscal year 2010, this does not necessarily mean that the DPHHS has violated the requirements of 53-6-125, MCA. However, because some of the specific reimbursement rates, which is the amount of money paid to physicians for providing specific services to Medicaid recipients, do dip below the 2010 level, the DPHHS's adoption of MAR Notice 37-541 is in conflict with 53-6-125, MCA.

Two members of the CFHHS Interim Committee, Senator Mary Caferro and I, testified at the hearing on MAR Notice 37-541, which was held on July 21, 2011. Senator Caferro and I testified that the legislative intent of SB 241 was to ensure that all physicians were paid no less than the Medicaid rates they received in 2010. The DPHHS incorrectly interprets the amendments to 53-6-125(2)(a), MCA, in the Notice of Amendment for MAR 37-541 by interpreting the requirement "to maintain reimbursement, at a minimum, at the fiscal year 2010 reimbursement rate" to mean that the reimbursement rate in the aggregate must be maintained. In essence, the DPHHS's position is that so long as the total number of dollars it spends reimbursing physicians for treating Medicaid patients stays at or above the fiscal year 2010 level, the legislative intent of SB 241 is met.

There are several problems with this analysis. First, only a court can ultimately determine legislative intent. Thus the DPHHS claim that "[the] Legislature intended in the aggregate to reimburse physicians the same amount of money in SFY 2012 that Montana Medicaid paid in SFY 2010" lacks merit. Second, nowhere in the text of 53-6-125, MCA, is there a reference to aggregate reimbursement. In fact, in reviewing 53-6-125, MCA, as a whole, it is clear that the entire statute is geared toward reimbursement rates for a "covered service" and not aggregate payouts by the DPHHS for an entire fiscal year. 53-6-125(1), MCA. Under principles of statutory construction, it is inappropriate to insert language into a statute. (1-2-101, MCA) Further, the meaning of a statute is generally determined by a plain reading of the statute. In this case, by interpreting 53-6-125(2)(a), MCA, to include the phrase "reimbursement in the aggregate", the DPHHS has both ignored the plain meaning and inserted language not present in the statute. As set forth above, the DPHHS's interpretation of 53-6-125, MCA, lacks merit and is in conflict with the plain language of the statute.

Pursuant to the authority granted to the CFHHS Interim Committee as the rulemaking review authority for DPHHS and pursuant to 2-4-406, MCA, the Committee is submitting this letter in written objection to the DPHHS's adoption of MAR Notice 37-541. Under 2-4-406, MCA, the

Committee does not consider the rule adoption contained in MAR Notice 37-541 to have been done in substantial compliance with 2-4-305, MCA, which states that rules may not be adopted when they are in conflict with statute as is the case here.

Pursuant to 2-4-406, MCA, the DPHHS is required to respond to this letter within 14 days. After receipt of the response, the CFHHS Interim Committee may withdraw or modify its objection. Section 2-4-406, MCA, further states:

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided an agency response must also be published if requested by the agency. Costs of publication of the objection and the agency response must be paid by the committee.

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency.

Finally, if an administrative rule is not implemented in accordance with the requirements of Title 2, chapter 4, parts 3 and 4, of the Montana Administrative Procedure Act, it is not considered effective. Such could be determined to be the case here where the DPHHS is attempting to adopt a rule in direct conflict with the statute.

Twice since 2007, the Legislature has addressed physician reimbursement rates only to have DPHHS circumvent legislative intent.

Thank you for your consideration of this matter.

Sincerely,

Sen. Jason Priest  
CFHHS Chairman

cc: Bernie Jacobs, DPHHS Chief Legal Counsel  
CFHHS Interim Committee  
Montana Secretary of State, Linda McCullough